A **KETUA PENGARAH HASIL DALAM NEGERI & ANOR**

**v.**

**MAXIS COMMUNICATION BHD**

B COURT OF APPEAL, PUTRAJAYA
SYED AHMAD HELMY JCA
ABDUL WAHAB PATAIL JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: W-01-665-2010]
C 20 FEBRUARY 2013

***COMPANY LAW:*** *Shares - Dealing by company in its own shares - Scheme to offer shares to employees - Company could not honour obligations due to take over - Employees accepted Equivalent Cash*
D *Consideration ('ECC') - Whether ECC payment ordinary cash remuneration - Whether s. 13(1)(a) Income Tax Act 1967 applied - Whether there was vesting of shares the rights to which may be exercised, assigned, released or acquired - Whether ss. 25(1A) & 32(1A) Income Tax Act 1967 applicable*

E ***REVENUE LAW:*** *Shares - Scheme to offer shares to employees - Company could not honour obligations due to take over - Employees accepted Equivalent Cash Consideration ('ECC') - Whether ECC payment ordinary cash remuneration - Whether s. 13(1)(a) Income Tax*
F *Act 1967 applied - Whether there was vesting of shares the rights to which may be exercised, assigned, released or acquired - Whether ss. 25(1A) & 32(1A) Income Tax Act 1967 applicable*

This was an appeal against the order of the High Court allowing the respondent's application for judicial review filed under O. 53
G r. 2 of the Rules of the High Court 1980 and setting aside the ruling by the Director General of Inland Revenue ('Director General'). Briefly, the facts were that the respondent, Maxis Communication Bhd ('Maxis') offered a binding Maxis Employee Share Option Scheme ('ESOS Scheme') which was accepted by
H its employees. However, when Binariang GSM Sdn Bhd take-over offer succeeded, Maxis could no longer honour its obligations under the ESOS Scheme. Maxis proposed and the employees accepted *in lieu* thereof an Equivalent Cash Consideration ('ECC'), the acceptance of which would relieve Maxis of its contractual
I obligations under the ESOS Scheme to offer shares to participating employees. The issues that arose for consideration

were whether (i) the ECC payment was ordinary cash remuneration to which s. 13(1)(a) of the Income Tax Act 1967 ('the Act') applied; or (ii) the ECC payment was to release the employee of his right to acquire shares and was gross income to which ss. 25(1A) and 32(1A) of the Act applied.

**Held (allowing the appeal; setting aside decision of High Court)**
**Per Abdul Wahab Patail JCA delivering the judgment of the court:**

**(1)** Section 32(1A) of the Act means that the exercise, assignment, release or acquisition of the right to the shares relates to shares an employee is determined to be entitled to since in order for vesting to occur, the number of shares awarded or offered must be determined. The ECC exercise does not appear to be part of any such an exercise. Under the ECC, Maxis was in fact to be relieved of the contractual obligation to make such award or offer. There was no vesting of any shares the rights to which may be exercised, assigned, released or acquired. It was not, therefore, made under the ESOS Scheme *per se* but was a collateral and separate exercise to relieve Maxis of the ESOS Scheme obligation while the shares were not yet awarded or offered and was therefore unvested. (para 11)

**(2)** There was a binding contractual obligation giving the employees a right to acquire shares under the terms of the Scheme, but the actual entitlements remained to be determined *ie*, the passage of time the employee remained in employment (*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd;* foll). There was no right to specific shares yet. They remained unvested. The ECC was dealing with these unvested shares. Thus, the application of ss. 25(1A) and 32(1A) did not arise. It was evident that the High Court had misconstrued the law and the Director General had not. There was no reason for judicial intervention by the High Court. (paras 11 & 12)

***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan terhadap perintah Mahkamah Tinggi membenarkan permohonan responden untuk semakan kehakiman yang telah difailkan di bawah A. 53 k. 2 Kaedah-Kaedah Mahkamah Tinggi 1980 dan mengenepikan keputusan yang dibuat

oleh Ketua Pengarah Hasil Dalam Negeri ('Ketua Pengarah'). Secara ringkas, fakta menunjukkan bahawa responden, Maxis Communication Bhd ('Maxis') telah menawarkan satu Skim Opsyen Saham Pekerja Maxis yang mengikat ('Skim ESOS') yang telah diterima oleh pekerja-pekerjanya. Walau bagaimanapun, apabila Binariang GSM Sdn Bhd telah berjaya mengambil alih, Maxis tidak dapat menunaikan obligasi-obligasinya di bawah Skim ESOS. Maxis mencadangkan dan pekerja-pekerja telah menerima satu Pertimbangan Tunai Setara ('ECC'), di mana penerimaannya akan melepaskan Maxis daripada obligasinya di bawah Skim ESOS untuk menawarkan saham-saham kepada kakitangan yang menyertai. Isu-isu yang dibangkitkan untuk pertimbangan adalah sama ada (i) bayaran ECC adalah ganjaran tunai biasa di mana s. 13(1)(a) Akta Cukai Pendapatan 1967 ('Akta') boleh digunapakai; atau (ii) bayaran ECC adalah untuk melepaskan pekerja daripada haknya untuk memperolehi saham dan adalah pendapatan kasar di mana ss. 25(1A) dan 32(1A) Akta digunapakai.

**Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)**
**Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:**

**(1)** Seksyen 32(1A) Akta bermaksud perlaksanaan, tugasan, pelepasan dan pemerolehan hak ke atas saham-saham adalah berkaitan dengan saham-saham seseorang pekerja yang diputuskan layak untuk memperolehinya kerana untuk perletakhakkan berlaku, jumlah saham yang diawardkan atau ditawarkan mesti ditentukan. Perlaksanaan ECC tidak menjadi sebahagian daripada mana-mana latihan sedemikian. Di bawah ECC, Maxis dilepaskan dari obligasi kontrak untuk membuat award atau tawaran sebegitu. Tiada perletakhakkan ke atas mana-mana saham di mana hak-hak itu boleh dilaksanakan, ditugaskan, dilepaskan atau diperolehi. Oleh itu, ia tidak dibuat di bawah Skim ESOS dengan sendirinya tetapi adalah kolateral dan perlaksanaan berasingan untuk melepaskan Maxis daripada obligasi Skim ESOS sementara saham-saham belum lagi diawardkan atau ditawarkan dan dengan itu, belum lagi diletakhak.

**(2)** Terdapat obligasi kontrak terikat yang memberi pekerja-pekerja hak untuk memperolehi saham-saham di bawah terma-terma Skim itu, tetapi kelayakan sebenar masih belum ditentukan

sebagai contohnya, tempoh masa seseorang pekerja itu kekal dalam pekerjaan (*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd;* diikuti). Masih tidak adanya hak ke atas saham-saham tertentu lagi. Saham-saham itu kekal tidak diletakhakkan. Oleh itu, pemakaian ss. 25(1A) dan 32(1A) tidak timbul. Ia adalah terbukti bahawa Mahkamah Tinggi telah menyalahtafsirkan undang-undang dan Ketua Pengarah tidak khilaf. Tiada sebab untuk campur tangan kehakiman.

**Case(s) referred to:**
*Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC* ***(foll)***

**Legislation referred to:**
Income Tax Act 1967, ss. 13(1)(a), 25(1A), 32(1A)
Rules of the High Court 1980, O. 53 r. 2

*For the appellants - Hazlina Hussain (Ahmad Khairuddin Abdullah with her); FCs*
*For the respondent - Rishwant Singh (P Jayasingam & Gandhi Mohan with him); M/s Zul Rafique & Partners*

*[Appeal from High Court, Kuala Lumpur; Judicial Review No: R3-25-335-2008]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Abdul Wahab Patail JCA:**

**[1]** Having heard the submissions of the parties, this court allowed the appeal with costs fixed at RM15,000. The order of the High Court was set aside and the ruling of the Director-General of Inland Revenue dated 10 October 2008 was affirmed.

**[2]** The appeal was against the order of the High Court which allowed the respondent's application for judicial review filed under O. 53 r. 2 of the Rules of the High Court 1980 and setting aside the ruling by the Director-General that:

(i) Pursuant to cl. 7.1.1 of ESOS Scheme Byelaws, the options only vested from the date of the first anniversary that the employee is offered the option and not from the date of grant;

(ii) Consequently, an employee does not have any rights in an unvested option before the date of the first anniversary and the requirement that there be a "... right to acquire shares in a company..." in s. 25(1A) of the Act is not fulfilled;

(iii) From a legal standpoint, before the amendment to ss. 25(1) and 32(1) of the Act, these unamended provisions did not apply to IS because the ECC offered to the employees were not offered in their original form ie, as shares and the price has been ascertained without reference to the material market value. It is further not subjected to market risks as ordinary ESOS schemes are;

(iv) When Maxis employs cl. 10.1 of the ESOS Scheme Byelaws, Maxis substitutes the cancellation of the ESOS Scheme with an alternative consideration. In this instance, Maxis' employees are paid an alternative consideration in return for the cancellation of the ESOS Scheme. The alternative consideration is no longer in the form of shares which need to be valued, and to the contrary, it is the receipt of cash arising from employment; and

(v) Maxis' employees are not offered fresh share options as a consequence of the takeover and instead are paid a sum of money the value and timing of which is based on the ESOS Scheme. Further, Maxis' employees do not have to pay anything to receive the said payment and this is different from the ordinary ESOS where an employee has to make payment to enforce the offer of shares given to him.

**[3]** A brief description of the background is necessary in understanding the issue before the court.

## Background

**[4]** There was in place a binding Maxis Employee Share Option Scheme (ESOS Scheme) offered by Maxis and accepted by its employees. When Binariang GSM Sdn Bhd takeover offer succeeded, Maxis could no longer honour its obligations under the ESOS Scheme. Maxis proposed and the employees accepted *in lieu* thereof an Equivalent Cash Consideration ("ECC"), the acceptance of which would relieve Maxis of its contractual obligations under the ESOS Scheme to offer shares to participating employees.

**[5]** The issue is whether: A

(a) the ECC payment is ordinary cash remuneration to which s. 13(1)(a) of the Income Tax Act 1967 (Revised 1971) applied, or

(b) the ECC payment to release the employee of his right to B acquire shares and is gross income to which ss. 25(1A) and 32(1A) of the Act applies.

**[6]** The argument for the respondent is that the ECC payment was to relieve Maxis from having to honour its contractual C obligation under the ESOS Scheme and was therefore not a salary or ordinary cash remuneration under s. 13(1)(a) of the Act, but was, instead, a share based payment to which the special provisions on the right to acquire shares under ss. 25(1A) and 32(1A) of the Act applies. D

## The Law

**[7]** Gross income of an employee in respect of gains or profits from an employment is defined in s. 13 of the Act to include any E wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment.

**[8]** Section 25 concerns the basis period to which the gross income is related. Subsection (1A) provides that the gross income F from an employment in respect of any right to acquire shares in a company of the kind to which para. 13(1)(a) applies, shall where the right is exercised, assigned, released or acquired in the relevant period be treated as gross income of the relevant person for that relevant period. G

**[9]** Section 32(1A) sets out the special provisions for determination of the amount to be included in his gross income and the relevant period. It was provided that the amount shall be the market value of the shares: H

(a) on the date of; or

(b) on the date specified for; or

(c) the first day of the period specified for the exercise, I assignment, release or acquisition of the right to the shares.

**[10]** Paragraph (b) of sub-s. (1A) what is meant by the term market value of the shares.

**[11]** In our view, s. 32(1A) means that the exercise, assignment, release or acquisition of the right to the shares relates to shares an employee is determined to be entitled to since in order for vesting to occur the number of shares awarded or offered must be determined. The ECC exercise does not appear to be part of any such an exercise. Under the ECC, Maxis was in fact to be relieved of the contractual obligation to make such award or offer. There was no vesting of any shares the rights to which may be exercised, assigned, released or acquired. It was not, therefore, made under the ESOS Scheme *per se* but was a collateral and separate exercise to relieve Maxis of the ESOS Scheme obligation while the shares were not yet awarded or offered and was therefore unvested. Following *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 as to interpretation of a taxing statute, and looking fairly at the language used, it is true there was a binding contractual obligation giving the employees a right to acquire shares under the terms of the scheme, but the actual entitlements remained to be determined, eg, the passage of time the employee remained in employment. There was no right to specific shares yet. They remained unvested. The ECC was dealing with these unvested shares. We conclude that the application of ss. 25(1A) and 32(1A) does not arise.

**[12]** It is evident that the High Court has misconstrued the law and the Director-General of Inland Revenue had not. There was no reason for judicial intervention by the High Court.

**[13]** For the foregoing reasons, we made the decision first above set out.